No. 193. October Term, 1901.

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Brf. of Henderson for Pl'ff in Error

IN THE

Supreme Court of the United States.

Filed Feb. 24, 1902.

Jeannie M. Wilson, Administratrix *d. b. n. c. t. a.* of the Estate of Alexander Osbourn, deceased, &c., Plaintiff in Error,

vs.

Adam Iseminger and Elmer H. Rogers.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

INDEX.

GEORGE HENDERSON.

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vs.

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STATEMENT OF THE CASE.

The action below was upon a covenant *sur* ground rent deed dated January 4th, 1854, for the semi-annual arrears of rent arising thereunder from 1887 to 1896, inclusive. The rent was reserved by Alexander Osbourn, the testator of the plaintiff in error, Adam Iseminger being the covemantor. Elmer H. Rogers, the *terre* tenant, was permitted to intervene and defend *pro interesse suo.*

Upon filing of the affidavit of defense the plaintiff took a rule for judgment, from the discharge of which an appeal was taken to the Supreme Court of Pennsylvania. The action of the lower court in declaring the Act of 27th April, 1855, constitutional, was sustained. (See opinion on page 36 of the transcript of the Record.)

The cause was then plead to issue, and tried before Brégy, J., and a jury. By agreement of counsel, the plaintiff's claim for arrears of rent was established by his offering in evidence the statement of claim filed in the cause and the ground rent deed sued upon. The record discloses that the trial judge was requested to rule that the application of the seventh section of the Act of 27th April, 1855, of the Pennsylvania Assembly to this ground rent was unconstitutional because such application would impair the contract in the deed reserving the rent, this being inhibited

by the tenth section of article I. of the Constitution of the United States. The request was declined and binding instructions given for the defendant, the court charging in full as follows:—

> "GENTLEMEN:—As the law says that a ground rent not demanded within twenty-one years is irrecoverable, the verdict in this case must be for the defendant. The plaintiff is not entitled to recover because demand was not made within twenty-one years. It is too old to make a claim of that kind.
>
> "I decline the plaintiff's points."

Judgment having been entered in favor of the defendant, the plaintiff again removed the cause to the Supreme Court of Pennsylvania. The judgment of the lower court was affirmed. (See opinion on page 28 of transcript of Record.)

Harry G. Clay, the former administrator, resigned his position and Jeannie M. Wilson was appointed in his place. She was duly substituted as party plaintiff and thereupon obtained a writ of error to this court.

The plaintiff contends that the Act of 27th April, 1855, of the Pennsylvania Assembly, under which her recovery is barred, impairs her contract because as to rents reserved before its passage it lays down a new rule of property. The said statute exceeds the legitimate scope of an Act of limitation in the retrospective application of the new rule of property.

SPECIFICATIONS OF ERROR.

I. The Supreme Court of Pennsylvania erred in not deciding that the Act of the Pennsylvania Assembly of 27th of April, 1855, section 7, lays down a new rule of property which retroactively applied to said ground rent reserved in 1854 impairs the obligation of the contract in the deed reserving the same.

II. The Supreme Court of Pennsylvania, in deciding that the Act of the Pennsylvania Assembly of 27th April, 1855, section 7, merely operates to deprive the owner of the ground rent estate of a remedy for its collection, erred because the estate in the rent never becomes due and collectable.

III. The Supreme Court of Pennsylvania erred in deciding that arrears of rent accruing less than two months before the issuing of the writ in this case could not be recovered because the Act of the Pennsylvania Assembly of 27th April, 1855, section 7, had taken away the remedy before the right of action had arisen.

IV. The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas, No. 1, of Philadelphia County in this cause.

V. The Supreme Court of Pennsylvania erred in not reversing the judgment and awarding a *venire facias de novo* to the Court of Common Pleas, No. 1, of Philadelphia County in this cause.

VI. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 1 of Philadelphia County because the court declined the plaintiff's first point, which was:—

> "*First.*—That under the evidence in this case, the verdict should be for the plaintiff."

VII. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 1, of Philadelphia County, because that court declined the plaintiff's second point, which was:—

> "*Second.*—That the seventh section of the Act adopted by this Commonwealth on the 27th of April, 1855 (P. L., 368, section 7), which is as follows:—

> "'That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable: *Provided,* That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the proper county the duplicate of any receipt therefor, proved by oath or affirmation to be a true copy of that signed and delivered in the presence of the payer, and witnessed at the time by this deponent, which recorded duplicate, or the exemplification of the record thereof, shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge in any court of record, or the transcript herein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed: *Provided,* That this section shall not go into effect until three years from the passage of this Act,'

is unconstitutional, because it impairs the contract in the deed reserving this rent, being inhibited by the tenth section of article I. of the Constitution of the United States, which is as follows:—

> "'No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver a tender in payment of debts; pass any bill of attainder, *ex post-facto* law or *law impairing the obligation of contracts,* or grant any title of nobility.'"

VIII. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 1, of Philadelphia County, because that court charged as follows:—

> "As the law says that a ground rent not demanded within twenty-one years is irrecoverable, the verdict in this case must be for the defendant."

Some Salient Points in the Law of Ground Rents before the Act of 27th April, 1855, and the Change in Public Policy which took place about that time.

Pennsylvania having been granted to Penn under tenure of free and common socage as of the castle of Windsor, and it having been early decided that the statute *quia emptores* was not in force in that State, the Supreme Court determined, in Ingersoll *vs.* Sergeant, 1 Wharton, 336-352 (1836), that a ground rent was a rent service with the incidents of fealty and tenure. See, also, Bosler *vs.* Kuhn, 8 W. & S., 184 (1844). Attention is here directed to these two incidents, because that of fealty strengthens and dignifies the obligation which it is claimed has been impaired, and because the incident of tenure imports a relation between the ground-rent landlord and the owner subject to the rent, which cannot be constitutionally severed in the way attempted by the seventh section, Act of 27th April, 1855.

A ground rent is reserved, not created. Ingersoll *vs.* Sergeant, *supra*. It is an annual sum reserved from the fruits of the land, and not a gross sum secured or paid. Cadwalader on Ground Rents, section 101. The ground-rent landlord cannot demand the cash value of his estate; it never becomes due, and is not subject to foreclosure, like a mortgage. Juvenal *vs.* Jackson, 14 Pa., 523 (1850). Judge Hare said, in Hillerman *vs.* Ingersoll, 5 Phila. Reports, 143, 144 (1863):—

> "But with a ground rent * * * the purpose is not that the principal shall be paid, but that it

> shall remain until the tenant thinks fit to pay it; the landlord cannot call in his money, and must suffer it to stand until it is brought to his door. He is not guilty of laches, nor the tenant of a default, and there is consequently no room for the presumption which might arise if the one had failed to perform and the other had neglected to insist on performance."

Judge Hare was speaking simply of the estate, and not of the semi-annual installments of interest.

A ground rent is reserved by deed which is the act of both parties. The burden of the covenant made by the grantee in fee runs with the land to the assignee of the grantee. Dunbar *vs.* Jumper, 2 Yeates, 74 (1796); Cadwalader on Ground Rents, section 11. The annual payments spring into existence and become debts when demandable. Bosler *vs.* Kuhn, 8 W. & S., 183 (1844).

The obligation of the tenant in fee can be well stated in the language of Chief Justice Sharswood's lectures, page 220:—

> "That he will pay the rents and make the returns which he has engaged to do, and that he will defend the title which he has received; that he will not disclaim nor deny it, and neither yield up nor attorn to a stranger."

The tenant cannot deny the title of the landlord. Heckerman *vs.* Hummell, 19 Pa., 70 (1852); Louer *vs.* Hummell, 21 Pa., 454 (1853).

The covenant to pay the annual rent as it becomes due excuses demand by the ground-rent landlord. Cadwalader, section 308. The tenant may be penalized with interest for any delay in making tender. McQuesnay *vs.* Hiester, 33 Pa., 435 (1859).

In St. Mary's Church *vs.* Miles, 1 Wharton, 229 (1835), affirmed in McQuesnay *vs.* Hiester, *supra*, and in Lindsey *vs.* Lindeman, 69 Pa., 100 (1871), Mr. Justice Kennedy said:—

> " * * At common law mere lapse of time, without demand of payment, is not sufficient to raise a presumption that a ground rent has been released or otherwise extinguished. The lapse of twenty years without demand of payment is evidence from which a jury may presume payment of the arrears of the ground rent; but even this presumption may be repelled by circumstances."

See, also, Cadwalader, section 463.

Counsel for the defendant in error, in St. Mary's Church *vs.* Miles, *supra*, state (page 232) that it was common to suffer ground rents in Philadelphia to remain in arrear many years:—

> "Instances have occurred of the recovery of arrears for fifty years."

The relation of tenancy exists until severed by some unequivocal act. In Cadwalader *vs.* App., 81 Pa., 194-211 (1876), the case of a lease for ten thousand years, the Supreme Court said:—

> "When one has entered expressly or legally in subservience to the title of the owner, the statute (of limitation) does not begin to run in favor of such occupant until the privity between him and the owner is severed by some unequivocal act."

In all ground-rent deeds there is a covenant for the release of the estate by deed. (See deed in this case, transcript of record, page 18.) Mr. Justice Kennedy said, in St. Mary's Church *vs.* Miles (1835), *supra*, at page 235, that "a release without the execution of a deed, perhaps, never happened."

In order to afford a more complete remedy for ground-rent landlords the Act of 25th April, 1850, P. L., 569, section 8, was passed. It is still in force, and provides as follows:—

> "In all cases now pending, or hereafter to be brought in any court of record in this Common-

wealth, to enforce the payment of ground rent due and owing upon lands or tenements, held by virtue of any lease for life, or a term of years, or in fee, the lessor, his heirs and assigns, shall have a full and complete remedy therefor by action of covenant against the lessee or lessees, his, her, or their heirs, executors, administrators, or assigns, whether said premises out of which the rent issues be held by deed, poll, or otherwise."

Ground rents were early in great favor in Pennsylvania. (See Kennedy, J., in St. Mary's Church *vs.* Miles, *supra*, page 235.) E. P. Allinson, in his history of ground rents in Philadelphia (1888), (University of Pennsylvania Publications, No. 3), says they have been a potent influence in developing Philadelphia and in the creation of a multitude of small houses. It was early decided they could be apportioned. Although the conversion of real estate of minors is not favored, the Act of 16th March, 1847, section 2, P. L., 474, was passed empowering the Orphans' Court to decree the letting of lands of minors on ground rent; the Act of 23d January, 1847, protected them from discharge by sale under a municipal claim; section 1 of the Act of 7th March, 1853, P. L., 155, authorizes all building associations to sell lands on ground rents; the Act of 23d April, 1858, authorizes all insurance, trust companies, and saving funds to purchase, hold, sell, and convey ground rents; and the Act of 8th May, 1876, enables hospitals, schools, and charitable institutions to purchase, take, and hold them.

About 1850 there arose an antagonism to certain incidents to ground-rent estates. The Act of 22d April, 1850, P. L., 549, forbade the reservation of rents to become perpetual upon the breach of a condition in the deed; the Act of 24th June, 1885, P. L., 161, section 1, forbade the creation of irredeemable and non-extinguishable ground rents; the Act of 28th April, 1868, empowered a court of equity to extinguish ground rents presumed to be released under the Act of 27th April, 1855;

but in Haines' Appeal, 73 Pa., 169 (1873), Judge Sharswood declared the Act unconstitutional as an infringement of the right of trial by jury; the Act of 15th April, 1869, P. L., 47, provided for the compulsory extinguishment of irredeemable rents upon compensation by the tenant. This was also declared unconstitutional in Palairet's Appeal, 67 Pa., 479 (1871).

The seventh section of the Act of 27th April, 1855, was a part of this antagonistic legislation. A glance at its provisions will show that it is more than a mere act of limitation; it lays down new rules of property. It retroactively modifies the incidents of ground-rent estates in such a way as to impair the contract in the deed reserving the rent. Expediency or a change in public policy can never justify the disregard of fundamental constitutional principles. Mr. William D. Guthrie, in his volume on the Fourteenth Amendment, says, on page 40:—

> "Present inconvenience, however great, present expediency, however tempting, can never justify the slightest disregard of any provision of a constitution."
>
> Angle *vs.* Chicago, &c., Railway Co., 151 U. S., 1, 18.

The Act of 27th April, 1855, Section 7.

"That in all cases where no payment, claim, or demand shall have been made on account of or for any ground rent, annuity, or other charge upon real estate for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises, subject to such ground rent, annuity, or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity, or charge shall thereafter be irrecoverable: *Provided*, That the evidence of such payment may be perpetuated by recording in the recorder of deeds' office of the

proper county the duplicate of any receipt therefor, proved by oath or affirmation to be a true copy of that signed and delivered in the presence of the payer and witnessed at the time by this deponent, which recorded duplicate or the exemplification of the record thereof shall be evidence until disproved; and the evidence of any such claim or demand may be perpetuated by the record of any judgment recovered for such rent, annuity, or charge in any court of record, or the transcript therein filed of any recovery thereof by judgment before any alderman or justice of the peace, which record and judgment shall be duly indexed: *Provided*, That this section shall not go into effect until three years from the passage of this Act."

Interpretation of said Act by the Supreme Court of Pennsylvania.

Since the passage of this Act the Supreme Court of Pennsylvania has been uncertain as to the ground of decision upon which to rest its constitutionality. In Korn *vs.* Browne, 64 Pa., 55 (1870), it was said that the Act was one perfecting title to real estate after twenty-one years' adverse possession. In Haines' Appeal, 73 Pa., 169 (1873), the Act of 28th April, 1868, providing for the extinguishment of ground rents presumed to be extinguished under the Act of 27th April, 1855, was declared to be unconstitutional. Justice Sharswood tacitly conceded the error in the ground of decision in Korn *vs.* Browne, and at the close of his opinion he said:—

> "We assume in this judgment that the evidence brought the case in law entirely within the purview of the Act of 1855. Upon that, however, we give no opinion."

In Biddle *vs.* Hooven, 120 Pa., 221 (1888), the constitutionality of the Act was assailed by Richard M. Cadwalader, Esq., the author of the treatise on ground rents in Pennsylvania. It was seen that the Act could

not be sustained as one perfecting title after twenty-one years' adverse possession, because there could be no adverse possession without first severing ~~of~~ the tenancy. Mr. Justice Paxson, on page 227, concedes the error in the reasoning. He says that the Act merely operates to deprive the owner of a remedy after twenty-one years. And further, that—

> "The Act was not intended to destroy the ground landlord's ownership in the rent; it does not impair his title thereto, nor can it be said to impair the contract by which the rent was reserved, but from well-grounded reasons of public policy it declares that when the owner of such rent makes no claim or demand therefor for twenty-one years, it presumes it has been extinguished, which means nothing more than that it has been paid. * * *"

Let us examine this reasoning as applied to ground-rent estates, not arrears, in the light of three elementary principles:—

(*a.*) No remedy arises until the right of action accrues; (*b.*) the statute runs from the time the right of action accrues, and not from the date of the contract; and (*c.*) even though the remedy be taken away as to some arrears, the right in the estate remains inviolate. Campbell *vs.* Holt, 115 U. S., 625.

The remedies of the ground landlord are all with respect to the semi-annual installments of rent. As each becomes due a remedy arises. The right to collect each installment is independent of the others. The mere fact that some payments of an installment contract are barred cannot affect the right of recovery on those not matured. There is never a present right to sue for the ground-rent estate, *i. e.*, the principal sum invested; hence a statute cutting off the remedy has no relation to or effect upon the estate.

In Haines' Appeal, *supra*, it was decided that even after twenty-one years of non-payment, claim, or demand, the estate exists. In Biddle *vs.* Hooven, *supra*, it was said that the estate exists unimpaired. If it exists unimpaired,

then the sum of thirty-six dollars became due October 1st, 1896. The right of action as to this installment did not arise till then. This suit was brought within sixty days thereafter and we are told at the threshold our remedy is gone—actually taken away before the right accrued.

The fact that the seventh section of the Act of 1855 was not to become operative for three years after its passage has no bearing on the right of recovery of these arrears. They were not then due and did not mature till nearly thirty years later.

The reasoning in Korn *vs.* Browne was answered by the appellant in Biddle *vs.* Hooven, whereupon it was abandoned and a new basis adopted. This case is an attempt to answer the reasoning in Biddle *vs.* Hooven. It is dismissed with the remark that the question must be considered at rest.

ANALYSIS OF ARGUMENT.

The seventh section of the Act of 27th April, 1855, of the Pennsylvania Assembly, exceeds the legitimate scope of an Act of limitation in that it enacts a new rule of property which, retrospectively applied, impairs the obligation of the ground rent in question.

The argument will be developed under two general heads:—

I. The said Act exceeds the legitimate scope of an Act of limitation in that it enacts a new rule of property.

II. The retrospective application of this new rule of property impairs the obligation of this ground rent.

1. What is the obligation?
2. How is it impaired?

(*a.*) By depriving the owner of all remedy before the right of action arises.

(*b.*) By imposing a new condition of recovery.

(*c.*) By retrospectively applying a new rule of property.

I. THIS ACT EXCEEDS THE LEGITIMATE SCOPE OF AN ACT OF LIMITATION.

> "Cases may occur where the provisions of the law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for an interposition of the court."
>
> Jackson *vs.* Lamphire, 3 Peters, 280.

Acts of limitation are founded in public policy to quiet stale claims. They are sustained constitutionally upon the ground that claims should be promptly enforced, and to that end only a reasonable time after maturity must be allowed in which suit may be brought. If the limitative act concerns real estate it begins to run from some act inconsistent with ownership from which the law presumes an intention to abandon.

In the case of contracts the time limited does not run from the date thereof, but from the day of maturity. Until that day there is no right of enforcement and no default. If the contract be an installment one the limitation runs as to each installment from the day it falls due. Some installments may be barred by the statute, but that cannot affect the contract *quâ* the other installments. As to them there has been no day of maturity and no right to enforce payment, and hence no time from which the statute can begin to run.

By analogy the application of these principles is even more imperative in the case of ground rents. No portion of the principal sum invested in the estate in the rent ever matures. The semi-annual installments constitute the payment for the ground. As each payment falls due a right of action arises. If the remedy upon an installment contract cannot be taken away, *quâ* installments not matured, *a fortiori* is this true with ground rents.

The owner of a ground rent has a permanent investment so far as he alone is concerned. It is payable in semi-annual installments forever. The ground-rent landlord has no right to tender a deed of extinguishment and

demand the principal sum representing his rent. As to the estate in the rent there is no day of maturity, no day in court, no day of default, and hence no time from which a statute, *quâ* the estate, may begin to run. To presume the extinguishment of a contract because some installments are barred while others have not yet matured would be in excess of limitative principles.

The provisions of this Act are ineffectual to bar the estate in the rent. The seventh section provides that after twenty-one years of non-payment, claim, or demand there shall be a presumption of extinguishment, unless there has been a declaration or acknowledgment of the existence of the rent. Not one of the *criteria* established—non-payment, claim, or demand—has any reference to the estate in the rent, there being no right to claim or demand the principal sum invested; they simply refer to arrears of rent. It being beyond the power of the owner of the rent to demand payment on account of the estate therein, it necessarily follows that he cannot be deprived of his estate for failing to comply with an impossibility.

It is further provided that a declaration or acknowledgment shall rebut the presumption of extinguishment. In this way by the grace of the *terre*-tenant an extinguishment might be averted. But the execution of such a declaration or acknowledgment is not as of right. It scarcely needs argument to show that the enjoyment of property cannot be made dependent upon the whim of another. In Yick Wo *vs.* Hopkins, 118 U. S., 356, Mr. Justice Matthews said:—

> "The very idea that one man may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being of the essence of slavery itself."

By intendment, it may be argued, it is the purpose of this act to quiet the title to realty and not only to act on the remedy, but also on the estate iself. The time

limited in such a statute must be based on some act of the owner of the realty inconsistent with his rights as owner from which the law will presume an abandonment. It will be observed that this is the very minimum of requirement for such an Act. Nothing short of this will suffice. From a glance at the Acts of Limitation in force in the various States, most of which can be found in the appendix to "Angell on Limitations," it will be seen that a large number go further and require adverse possession as a basis. In this case a tenancy subsists. Heckerman *vs.* Hummel, 19 Pa., 64. There is no allegation of its severance.

Chief Justice Marshall says that it has not only been recognized in the courts of England, but in all others where the rules established in those courts have been adopted, that a possession which was permissive and entirely consistent with the title of another should not bar that title, and that it would shock the sense of right, which must be felt by all legislators and all judges, were it otherwise.

Kirk *vs.* Smith, 9 Wheat. (U. S.), 241, 288.

In Moore *vs.* State, 43 N. J. Law, 210, it is said:—

> "It is asserted that it is not within the appropriate sphere of legislation to take away vested rights of property without the fault or neglect of their owner; that government exists to guard such rights, not to destroy them, so far as this is true, is axiomatic; no advocate of free institutions will deny it; none can prove it."

Could a limitative act be based on anything but the fault or neglect of the owner, an act might be passed declaring that after twenty-one years of payment the *terre*-tenant shall be presumed to have received a release of the rent. Argument is unnecessary to demonstrate the invalidity of such an act, and yet it is closely analogous to that under discussion.

The question arises, do twenty-one years of non-pay-

ment, claim, and demand constitute evidence of abandonment upon which an act of limitation may be based? Fortunately for the appellant, this question is not an open one, it having been decided in the negative. In St. Mary's Church *vs.* Miles, 1 Wharton, 233 (1835), Mr. Justice Kennedy said:—

> "* * * The first is that upwards of thirty years having elapsed, without any demand having been made of the rent, or payment thereof received, a release of the right to demand it ought to be presumed. * * * Although it may be that the law will, in some cases, presume a grant in support of a right which has been exercised and enjoyed by a person, without objection or interruption, to the exclusion of all others, for a period of twenty years or more, yet it does not follow it ought to make such a presumption in order to defeat a person of a right created by a deed not controverted; without anything shown to have taken place in the conduct of the parties interested or concerned in the right that was inconsistent with the existence of it. * * * Nor was there ever any refusal on the part of the defendants * * * to pay it. * * * Until then nothing that was obviously incompatible with his right seems to have taken place. * * *"

This case was vigorously affirmed in 1859 in McQuesnay *vs.* Heister, 33 Pa., 439, and was cited approvingly in 1871 by Justice Sharswood in Lindsey *vs.* Lindeman, 69 Pa., 100.

Twenty-one years of non-payment, claim, and demand not being evidence of an intention to abandon the estate, can the legislature by an act decree otherwise? Recalling that we are discussing merely the retrospective feature of this act, there can be no question that the legislature cannot change the incidents of property so as to affect vested rights. This court has passed on the effect of such evidence and the legislature cannot modify that decision.

Indeed, in a *dictum* in St. Mary's Church *vs.* Miles, *supra*, Mr. Justice Kennedy said, foreshadowing the unconstitutionality of this act:—

> "We have no statute barring the right of an owner to an estate consisting of ground rent, through his neglect to assert it, nor yet to preclude him from recovering the rent itself, after any lapse of time, * * * The exercise of such a power would not only seem to be intrenching upon the legislative province, *but upon the constitutional right of the plaintiff*, by depriving him of his estate, without having given him any previous warning of his danger, so as to enable him to guard against it."

Having shown that this act exceeds the legitimate scope of a limitative act, in denying a remedy as to installments before they have matured, and in divesting title to the estate without some fault or neglect of the owner, it yet remains to be shown that thereby the obligation of the rent is impaired.

II. THE OBLIGATION OF THE RENT IS THEREBY IMPAIRED.

1. *What is the obligation of the rent?*

The nature of the obligation of a contract or grant is so clearly set forth in the cases we below cite that we shall not do more than allude to it.

The law which binds the covenantor to the performance of his promise is the law in force at the execution of the deed and which entered into and formed part of it. This is its obligation. Any subsequent act which diminishes the duty, obstructs the recovery, or by new rules of property imposes additional burdens on the covenantee, impairs the obligation.

In McCracken *vs.* Hayward, 2 How., 612, it appears that after the plaintiff had entered a judgment, the Legislature of Illinois passed an act providing that no property should

be sold by the sheriff for less than two-thirds of its value. In declaring the act unconstitutional, this court said:—

> "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * *
>
> "If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In Ogden *vs.* Saunders, 12 Wheat., 302, this court again said:—

> "The obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of, the contract, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term 'obligation'"

In Menges *vs.* Dentler, 33 Pa., 498, it was said:—

> "The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated.
>
> "* * * My case cannot be decided by due course

of law, apart from the particular law, statutory or customary, that constitutes part of it and gives it class and character. In the very nature of things a law that is enacted after the case has arisen can be no part of the case. Such a law can have only a forced and unnatural relation to the case, and must produce an untrue decision; a decision, not of the case arising between the parties, as it ought to be, but of a case partly created by the legislature."

And in Long's Appeal, 87 Pa., 119:—

> "Every contract when entered into is made in view of the law then existing for the enforcement of contracts, and so the law becomes part thereof. Ogden *vs.* Saunders, 12 Wheat., 259."

Under the law as it stood before the Act of 27th April, 1855, was passed, the ground-rent landlord, his heirs and assigns, were entitled to a "full and complete remedy" in covenant. Section 8, Act of 25th April, 1850, Pepper & Lewis' Digest, 2225:—

> "*Action of Covenant for Ground Rent Extended.*—In all cases now pending, or hereafter to be brought in any court of record in this Commonwealth, to enforce the payment of ground rent due and owing upon lands or tenements, held by virtue of any lease for life, or a term of years, or in fee, the lessor, his heirs and assigns, shall have a full and complete remedy therefor by action of covenant against lessee or lessees, his, her, or their heirs, executors, administrators, or assigns, whether the said premises out of which the rent issues be held by deed, poll, or otherwise."

He could recover on the strength of his deed without proving a payment, claim, or demand within twenty-one years. Evidence of non-payment, claim, or demand for twenty-one years did not raise even a rebuttible presumption of the extinguishment of the estate. These principles of law were written into this rent, and in their vigor it is the constitutional right of the plaintiff to have them enforced.

2. *How is the obligation of the rent impaired?*

We shall endeavor to show that the obligation of this rent is impaired (*a*) by depriving the owner of all remedy as to these arrears before a right of action has accrued; (*b*) by imposing a new condition of recovery; and (*c*) by retroactively applying a new rule of property.

(*a.*) By depriving the owner of all remedy as to these arrears before a right of action has accrued.

The earliest arrears of rent involved in this suit accrued April 1st, 1887. As to them there is not even a presumption of extinguishment. It needs no argument to enforce the principle that the deprivation of the remedy before a right of action works an impairment of the contract. We shall content ourselves by citing a few of the leading cases.

Sturges *vs.* Crowninshield, 4 Wheat., 122, was an action for a debt in which a discharge under the New York Bankruptcy Act of 1811 was pleaded as a defense.

In holding that this Act could not be set up as a defense because it would impair the contract, Mr. Chief Justice Marshall, in delivering the opinion of the court, said (page 197):—

> "What is the obligation of a contract? And what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable of misconstruction than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it. * * *"

In Von Hoffman *vs.* Quincy, 4 Wall., 535, it appears that the Legislature of Illinois had authorized the city of Quincy to issue bonds and to levy a special tax to pay the interest thereon, and subsequently materially diminished this power of taxation after the bonds had been issued. It was held that the statute diminishing the remedy by restricting the power of taxation was unconstitutional so far as it affected the bonds. Mr. Justice Story said:—

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. *The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion.* The obligation of a contract 'is the law which binds the parties to perform their agreement.' Sturges *vs.* Crowninshield, 12 Wheaton, 257.
>
> "'One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.' Planters' Bank *vs.* Sharp, 6 How., 227.
>
> "'A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the Constitution a shadow and a delusion.'"

> "A grant is within the protection of the clause forbidding the impairment of contracts. Fletcher *vs.* Peck, 6 Cranch., 87; 1 Hare's Am. Const. Law, 585.

No longer is the ground-rent deed *prima facie* evidence of the right. Under this Act and the authority

of Korn vs. Browne, 64 Pa., 55, the ground-rent landlord, to entitle him to recover, must also prove a payment, claim, or demand within twenty-one years. Even the remedy cannot be regulated by thus imposing a new condition upon the right of recovery, because it is not the law of the contract. It should be noted that more remedial statutes have been declared unconstitutional upon this ground than upon any other. The authorities are argumentatively convincing.

Judge Cooley, in his Constitutional Limitations, says, page 348:—

> "If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

And on page 354:—

> "And where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper, or embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contact so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void because a substantial denial of right."

And again on page 358:—

> "In each of these cases it is evident that substantial rights were affected; and so far as the laws which were held void operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy such as was

assured to him by the law in force when the contract was made."

Judge Hare, in his Constitutional Law, says, page 687:—

"A statute varying a grant or charter, or taking away any right which it confers, cannot be defended on the ground that the infringement is slight and does not injuriously affect the contract. The question in such cases is not one of degree, but whether the obligation is so varied as to alter the relations of the parties, or preclude a right that might have been enforced but for the change. A covenantee is entitled to the very thing for which he stipulated, and the legislature cannot substitute a different thing, although of greater value."

In Green *vs.* Biddle, 8 Wheaton, 1, Mr. Justice Washington, in delivering the opinion of the court, said:—

"* * * If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure according to the nature and extent of such restrictions. * * *

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend on the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation. * * *"

Bronson *vs.* Kinzie, 1 Howard, 311, was a suit on a mortgage. It appeared that the Legislature of Illinois passed an Act which provided that mortgagors should have the right to redeem mortgaged premises at any time within twelve months from the day of the sale. It

was declared that this Act impaired the obligation of antecedent mortgages.

Mr. Chief Justice Taney, in delivering the opinion of the court, said:—

> "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. * * * Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. * * *
>
> "We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligations of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing, and no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it. * * *
>
> "When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such at least, has been brought to the notice of the court; and it must, therefore, be governed, and the right of the parties under it measured, by the rules

above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for, by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law impairing the rights thus acquired impairs the obligations which the contract imposed. * * *

"It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. * * *

"Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt; and may impose such conditions and restrictions upon the creditor as its judgments and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the State."

See also—

McGahey *vs.* Virginia, 135 U. S., 662.

In Ohio Life Insurance Co. *vs.* Debolt, 16 How., 416, 431, it appeared that the plaintiff company had power under its charter to issue small bills. In order to compel the surrender of this power, the legislature laid a tax of twenty per cent. upon such corporations unless they would surrender this power, and then they were to be taxed but five per cent.

Mr. Chief Justice Taney declared the act unconstitutional, and suggested:—

> "Is a rule precluding a recovery on an antecedent contract, unless some act, not required by its terms be done, constitutional?"

C. By retroactively applying a new rule of property.

(*a.*) The old rule.

Before 1855 twenty-one years of non-payment, claim, or demand did not raise any presumption *quâ* the estate. Whereas now there is raised not only a presumption, but a conclusive presumption, and this, not from evidence, but from the mere fact that the estate has been reserved more than twenty-one years. Korn *vs.* Browne, 64 Pa., 55.

The state of the law previous to the passage of this act is so clearly set out in St. Mary's Church *vs.* Miles, *supra*, that we shall quote liberally from that opinion:—

> "* * * The first is that upwards of thirty years having elapsed, without any demand having been made of the rent, or payment thereof received, a release of the right to demand it ought to be presumed. * * * In regard to the first objection: although it may be that the law will, in some cases, presume a grant in support of a right which has been exercised and enjoyed by a person, without objection or interruption, to the exclusion of all others, for a period of twenty years or more, yet it does not follow that it ought to make such a presumption, in order to defeat a person of a right created

by a deed and not controverted; without anything shown to have taken place in the conduct of the parties intrusted or concerned in the right, that was inconsistent with the existence of it. In this case, from 1798, the time when the defendants first became the owners of the lot, out of which the plaintiff claims the ground rent, it does not appear that any demand was made of the rent until 1829, shortly before the commencement of this action; nor that there ever was any refusal on the part of the defendants, until then, to pay it, so that the plaintiff, had he claimed the rent by virtue of a bare previous seisin thereof, could not before that be said to have been disseized of it. Until then, nothing that was obviously incompatible with his right seems to have taken place. After this, he delayed no time in asserting his right by instituting this action for the recovery of it. But the rent claimed by the plaintiff being founded upon a reservation contained in a deed, whether he was ever seized of it or not, can in nowise affect his right to a recovery thereof. The evidence of his right to it does not depend upon his having been seized of it, but upon the deed, which is established beyond all question, and the tenor and effect whereof are too plain to be mistaken. This doctrine is fully established in Sir William Foster's case, 8 Co., 129, where it was held that a want of seisin within forty years, in the party, or those under whom he claimed a rent, as in the present case, was no bar or objection under the provisions of 32 Hen., 8, C. 2, to his distraining for it, because the party's right to the rent was evidenced by the reservation in the deed; and it was only where he was compelled, for want of such deed, to resort to evidence showing a seisin of the rent in order to establish his right to it, that this statute barred the claim, unless a seisin were proved to have existed within forty years. We have no statute barring the right of an owner to an estate consisting of ground rent, through his

neglect to assert it, nor yet to preclude him from recovering the rent itself, after any lapse of time. * * * The exercise of such a power would not only seem to be intrenching upon the legislative province, but upon the constitutional right of the plaintiff, by depriving him of his estate, without having given him any previous warning of his danger, so as to enable him to guard against it. It is proper here to bear in mind that it is the *title* or right of the plaintiff to the rent, as his freehold estate, that we are considering, and not his right to receive and enforce the payment of the back rents, which are the fruits of it, and which he alleges to be done and unpaid; because the rent, after it has become payable, is a mere debt or chose in action, which, from lapse of time, a jury might presume had been paid, in the absense of everything tending to show the contrary; but still the existence of the estate is *not* affected by such a presumption, nor the right of the owner thereof to demand and recover the subsequent accruing rents. It is of the very essence of the estate here that it should continue to exist according to its original limitation, continued in the reservation creating it; and accordingly it must endure forever, unless destroyed or put an end to by some positive act of the party having the power to do so, or by act or operation of law. But why should the neglect of the owner of the rent to demand it, after it has become payable for any given length of time, produce the same effect. Such neglect cannot in the least interfere with the rights of the owner of the lot, nor prejudice him in any way. He has a right to use and to improve the lot if he pleases; and this is all perfectly consistent with the duty that he owes to the owner of the ground rent. Their respective estates are distinct and susceptible of being fully enjoyed without conflict. Ground rents seem to have been created in this State with a view to promote the improvement of unimproved lands

by affording the grantees thereof the opportunity of employing their money in putting up dwelling and other houses thereon instead of giving it to the grantors in payment of what would have been considered a fair price for the purchase of the fee simple in the land, without any reservation of rent. The rent reserved in such cases forms the only and whole consideration that is to be paid for the land; and the grantee is bound to pay it only as long as the title which he receives from the grantor proves sufficient to protect and secure him in the enjoyment of the land granted. Hence, the right of the owner to the ground rent seems to be founded in great equity as well as justice, and ought not, therefore, to be regarded with any disfavor. Such a thing as the extinguishment of a ground rent by the owner thereof has seldom, perhaps never, happened without his executing a deed or instrument of writing to that effect, which may be placed on record, and the owner of the ground be thus protected forever after against the payment of the rent. There would seem, therefore, to be little reason for presuming a release of the ground rent merely from the delay of the owner in demanding it. Such presumption, if it were to be made, would doubtless be contrary to the truth of the fact in every case, and would certainly work injustice to the owner of the ground rent. As long, therefore, as the ground rent can be shown to have been created by a valid deed, and the title thereto clearly be established in the party claiming it, mere lapse of time ought not to be considered sufficient to raise the presumption that it has been released. * * *"

(*b.*) **The new rule.**

Since the adoption of the act of 1855 all ground-rent estates over twenty-one years old are presumed to be extinguished. This presumption can only be rebutted by showing a payment, claim, or demand within twenty-one years. Korn *vs.* Browne, 64 Pa., 55.

The act, furthermore, after twenty-one years of non-payment, claim, and demand, raises an irrebuttible presumption of extinguishment. What before was evidence of nothing inconsistent *quâ* the estate, has been made not *prima facie*, but conclusive, evidence of extinguishment. The retroactive application of this new rule sweeps away the estate in the rent and impairs its obligation.

The authorities forbidding the retroactive application of new rules of property are subjoined. Cooley, in his Constitutional Limitations, says, page 112:—

> "But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law, a 'rule of civil conduct,' because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

In Norman *vs.* Heist, 5 W. & S., 173, Chief Justice Gibson said:—

> "* * * No citizen shall be deprived of his life, liberty, or property unless by the judgment of his peers or the law of the land. What law? Undoubtedly a pre-existent rule of conduct. * * *"

The language of the court in Cornell *vs.* Hichens, 11 Wis., 353, is directly applicable to this case:—

> "* * * The legislature cannot interfere with or impair the obligations of past contracts by declaring that, as against persons not previously affected by them, certain facts, if set up in the pleadings and established in evidence, shall be a defense, and operated to defeat actions brought to enforce them. It seems a hidden way of attempting to accomplish indirectly that which it was felt could not be done directly. The blow might better have been aimed directly at the contracts themselves; for the legislature might

> with equal propriety have declared that they should not be evidence in any court of justice, or that all courts of the State should hold the makers discharged from them."

In Olcott *vs.* Supervisors, 83 U. S., 690, it appeared that in 1879 the defendants issued certain bonds to aid in the construction of a railroad. The Supreme Court of ~~Michigan~~ had declared a railroad to be a public purpose, in aid of which bonds could be issued. In 1870 an action was brought upon certain bonds of the county of Fond du Lac issued in aid of a railroad. An appeal was taken to the Supreme Court of Wisconsin, which now reversed its former decision and declared that a railroad was not a public purpose.

The case was then removed to this court which reversed the Wisconsin judgment, Justice Strong saying:—

> "This court has always ruled that if a contract when made was valid under the Constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If then, the doctrine asserted in Whiting *vs.* Fond du Lac Co. is inconsistent with what was the recognized law of the State when the county orders were issued, we are under no obligation to accept it and apply it to this case."

From such evidence as the Act of 1855 provides, or, to speak more accurately, from no evidence at all, since the burden of proof is upon the owner of the rent, no jury would be allowed to find such facts, no court would draw such inferences. Is it possible that the legislature can do so? It needs no argument to show that inher-

ently there are some things without the power of the legislature. In the matter of the petition of the American Banking and Trust Co., 37 W. N. C. (Penna)., 297, 300, Judge Penrose said:—

> "There are some things, however, beyond the power of the legislature, even irrespective of constitutional restrictions. It cannot change the laws of nature, the properties of numbers, or the meaning of words. It cannot modify an axiom. Water will not boil at one hundred and ten degrees, nor freeze at fifty-two degrees; twelve times twelve will always be one hundred and forty-four; insufficient cannot be made the equivalent of sufficient, bad the equivalent of good; and things which are not equal to the same thing will not, in spite of the most solemn enactment to the contrary, be equal to each other."

In conclusion, the plaintiff in error suggests that her wrongs can be righted without any real disturbance of titles which should be protected. The legislature meets next January, when a proper act can be adopted limiting actions *sur* ground rents reserved before 1855.

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